FILE COPY

No. 374.

NOV 18 19

CHARLES

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

HARRY BLOCKBURGER, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITIONER'S STATEMENT, BRIEF AND ARGUMENT.

HAROLD J. BANDY,
Granite City, Illinois,
Attorney for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CE ntral 4477.

INDEX.

	Page
Statement	1
Assignment of errors	8
Summary of argument	10
Argument	12
The penal section of the Harrison Narcotic Law did not authorize the imposition of separate punishments, each for the maximum provided by law, under counts 2 and 5 of the indictment	12
The entire transaction between petitioner and Ella Rush, as alleged in counts 2, 3 and 5 of the indictment, and disclosed by her testimony, involves only one crime	16
The conduct of the District Attorney in repeatedly asking inflammatory and improper questions in cross-examination prejudiced the jury against the petitioner and deprived petitioner of a fair trial	18
Conclusion	21

Authorities Cited.

Albrecht v. U. S., 273 U. S. 1	15
Ballerinai v. Aderholt, 44 Fed. (2) 352	14
Butts v. Merchants and Miners Transportation Company, 230 U. S. 126	13
25 R. C. L., Sec. 217	12
25 R. C. L., Sec. 301	13
U. S. C., Title 26, Sec. 705	4
U. S. C., Title 26, Sec. 692	3
U. S. C., Title 26, Sec. 696	3
U. S. v. Bitty, 208 U. S. 393	13
U. S. v. Doremus, 249 U. S. 86	16
U. S. v. Fisher, 109 U. S. 143	13
U. S. v. Reese, 92 U. S. 214	13
U. S. v. Wiltberger, 5 Wheat. 76	12

No. 374.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

HARRY BLOCKBURGER, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITIONER'S STATEMENT, BRIEF AND ARGUMENT.

STATEMENT.

The District Court did not file a written opinion in this case. The opinion of the Circuit Court of Appeals is reported in 50 Fed. (2d) 795. Justice Alschuler dissented from that opinion and filed a dissenting opinion.

Petitioner was indicted at the June Term, 1929, of the United States District Court for the Southern District of Illinois. He was jointly indicted with one Margaret Walker, who, at the trial, was found not guilty.

The first count of the indictment charged that defendants, on May 27, 1929, in the City of Springfield, Illinois, sold two grains of morphine hydrochloride to one Ella Rush, which was not in and from the original stamped package.

The second count charged that defendants, on May 28, 1929, in Springfield, Illinois, sold ten grains of morphine hydrochloride to Ella Rush, which was not in and from the original stamped package.

The third count charged that defendants sold eight grains of morphine hydrochloride to Ella Rush on May 29, 1929, and that it was not in and from the original stamped package.

The fourth count charged defendant with a violation of the Narcotic Drugs Import and Export Act. This was the only count of the indictment that did not charge a violation of the Harrison Narcotic Law. Petitioner was found not guilty on this count.

The fifth count alleged that defendants, on May 29, 1929, in the City of Springfield, Illinois, sold ten grains of morphine hydrochloride to Ella Rush, which sale was not in pursuance of a written order issued to the said Ella Rush upon a form for that purpose by the Commissioner of Internal Revenue.

The testimony of the Government's witnesses proved

three deliveries of morphine to Ella Rush by petitioner; that the first delivery consisted of two grains, the second of ten grains and the third of eight grains.

Upon count one, which charged the sale of two grains of morphine to Ella Rush, petitioner was found not guilty. Counts two, three and five, upon which he was convicted, involve the second and third sales to her.

Counts two and five each charge the sale of ten grains of morphine hydrochloride to Ella Rush by petitioner. These two counts involve the same sale. The counts differ only in this, that count two charges that the morphine was not then and there in and from the original stamped package, while count five charges that the sale was not made in pursuance of a written order issued to the said Ella Rush upon a form for that purpose by the Commissioner of Internal Revenue.

Count two charges a violation of Section 1 of the Harrison Narcotic Act (U. S. C., Title 26, Sec. 692), which provides, in part, as follows:

> "It shall be unlawful for any person to purchase, sell, dispose or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package."

Count five charges a violation of section 2 of the same act (U. S. C., Title 26, Sec. 696), which provides that:

> "It shall be unlawful for any person to sell, barter, exchange or give away any of the aforesaid drugs ex-

cept in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

The judgment of the District Court sentenced petitioner to serve a term of five years in the penitentiary at Leavenworth, Kansas, and to pay a fine of $2,000.00 upon each of counts two, three and five. A sentence of five years in the penitentiary and a fine of $2,000,00 is the maximum punishment permitted by the penal section of the Harrison Narcotic Law (U. S. C., Title 26, Sec. 705). The judgment of the District Court provided, further, that the sentences should run consecutively. In other words, the judgment imposed an aggregate penalty of fifteen years imprisonment and $6,000.00 fine.

In sentencing petitioner to five years in the penitentiary and the payment of a $2,000 fine under count two of the indictment, and inflicting the same sentence under count five, the Court held that the sale of a narcotic which was not in or from the original stamped package constituted one offense; and that the same sale, when not made in pursuance of a written order of the person to whom the narcotic was sold on a form issued in blank for that purpose by the Commissioner of Internal Revenue, constituted a separate crime, and that the person making the sale could be subjected to two distinct punishments, each one equalling the maximum permitted by law.

The penal section of the Harrison Narcotic Law (U. S.

C., Title 26, Sec. 705), provides: "That any person who violates or fails to comply with any of the requirements of this act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the Court."

After sentence was imposed, petitioner presented his written motion to the District Court, asking the Court to vacate or modify the judgment because (1) the sentence imposed was unreasonable and excessive, and (2) the sentence should not exceed five years in the penitentiary and a fine of $2,000, that being the maximum provided by law, and (3) the sentence imposed was in excess of that provided by law (Rec., p. 38). The Court denied this motion, but allowed petitioner an exception.

One of the errors which petitioner assigned in the Circuit Court of Appeals was that "the Court erred in imposing an excessive and unreasonable punishment" (Rec., p. 43).

The record in this case shows that a federal narcotic agent (Peterson) took one Ella Rush, herself addicted to the use of drugs, to Springfield, Illinois, and employed her there as a decoy to discover persons who were unlawfully selling narcotics and to incite them to make sales to her. Upon her arrival in Springfield she was given the names of several persons and instructed to become acquainted with them. She was told to visit Margaret Walker (co-defendant with petitioner on the indictment), who was an

addict, and who could probably be induced to bring her into contact with persons trafficking in drugs.

The evidence of Ella Rush, as discosed by the record, shows that she went to the home of Margaret Walker, represented herself to the Walker woman as an addict in need of morphine, and that through the use of many false representations and the payment of $10 of the Government's money, won the confidence of the Walker woman and succeeded in persuading her to introduce Rush to petitioner. This testimony shows that on the same night the Walker woman introduced petitioner to Ella Rush and that the Rush woman, through making use of the same false representations, induced petitioner to procure some morphine for her; that she gave petitioner $2 and he later delivered two grains of morphine to her on the same evening; that when he made this delivery to her she gave him $8 more and persuaded him to obtain more of the drug for her, whereupon he went away and returned early the following morning and delivered ten grains of morphine to her; that on the following forenoon she gave him more money and he went away to procure additional drugs for her, meeting her later and delivering eight grains of morphine to her; that she later attempted to induce him to procure more of this narcotic for her, but he refused to do so.

This record shows that, instead of being in Springfield as Government agents for the purpose of detecting vio-

lators of law, Ella Rush and Narcotic Agent Peterson were there for the purpose of inducing people to commit crimes. In order to accomplish this, Ella Rush told petitioner that she was working with a carnival that was showing in Springfield, and that Peterson, to whom she introduced petitioner, was a pickpocket. Peterson, a Government officer, admitted in his testimony that he permitted himself to be introduced to petitioner as a pickpocket. The record shows that disgraceful representations were made to petitioner for the purpose of winning his confidence and inducing him to provide Ella Rush with narcotics.

Ella Rush not only testified that she was an addict, but she stated from the witness stand that she had taken morphine on the very morning of the trial.

ASSIGNMENT OF ERRORS.

Petitioner respectfully represents that the United States Circuit Court of Appeals in the Seventh Judicial Circuit erred in deciding:

1. That the sentence imposed in this case did not constitute an excessive and unreasonable punishment.

2. That the sentence imposed in this case did not exceed the maximum provided by the Harrison Narcotic Law.

3. That the transactions in this case comprise three separate and distinct crimes.

4. That petitioner was not prejudiced through being asked, in cross-examination, if he did not know and associate with Henry Walker; with John Smith, known as "Cookie" Smith; with Edward Lewis, sometimes known as Clarke, and with Lloyd Hemstrett and "Speck" Mahoney, and if they were not all known to him to be morphine addicts.

5. That petitioner was not prejudiced by the District Attorney asking his witness, George Blockburger, this question: "Are you on a bond of a man named Bapple, who is charged with violation of the Narcotic Law, in this court?"

6. That petitioner was not prejudiced by the remarks of the District Attorney in his closing argument.

7. That petitioner was not prejudiced by the following part of the Court's charge to the jury: "There was a rule at one time that one who had been convicted of a felony was an incompetent witness. That is not the rule now; he is a competent witness, and the jury has a right to take the fact of a former conviction into consideration in determining the degree of credibility they will accord to him as a witness, and, if you believe him, to act upon his testimony."

SUMMARY OF ARGUMENT.

The penal section of the Harrison Narcotic Law did not authorize the imposition of separate punishments, each for the maximum provided by law, under counts 2 and 5 of the indictment. These counts involved the same sale, and, although the second count charged that the sale was not made from the original stamped package and the fifth count that it was not in pursuance of a written order upon a form for that purpose furnished by the Commissioner of Internal Revenue, the counts did not charge separate crimes. The language of the penal section of the Harrison Narcotic Law is that: "Any person who violates or fails to comply with any of the requirements of this act shall, on conviction," etc. The plain meaning of this language is that if, **by one act**, such as an unlawful sale, a person violates **any or all** the requirements of the act, he shall be subjected only to one punishment.

The entire transaction between petitioner and Ella Rush, as alleged in counts 2, 3 and 5 of the indictment and disclosed by her testimony, involves only one crime, and petitioner should have been subjected only to one punishment not exceeding the maximum provided for by the penal section of the Harrison Narcotic Law.

The conduct of the District Attorney in repeatedly asking petitioner and one of his witnesses inflammatory and improper questions in cross-examination for the sole purpose of prejudicing the jury against petitioner, and the

additional improper conduct of the District Attorney in making unwarranted statements not supported by the testimony in his closing argument to the jury deprived petitioner of a fair trial.

In the printed memorandum filed by the Solicitor General it is suggested that the cross-examination and argument which we criticize do not present questions of general importance and do not warrant review on certiorari. With this we do not agree. When the record of a case shows that a citizen, on trial in a federal court, has, through the conduct of the Prosecuting Attorney, been deprived of a fair trial, and that his conviction has been accomplished, in part, by the improper conduct of the prosecutor, a question of general importance is presented because no principle is more deeply engrafted into American jurisprudence than that every citizen shall be given a fair and impartial trial in an impartial tribunal in accordance with the law of the land. It is important that this right shall never be challenged or taken from a citizen. Section 240 (a) of the Judicial Code (U. S. C., Title 28, Sec. 347) provides that when a case comes to the Supreme Court by certiorari it shall "be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the case had been brought there by unrestricted writ of error or appeal." We respectfully submit that this language permits this Honorable Court to review the entire case, including everything that happened at the trial.

ARGUMENT.

MAY IT PLEASE THE COURT:

The penal section of the Harrison Narcotic Law provides that

> "any person who violates or fails to comply with any of the requirements of this act shall, on conviction, be fined not more than $2,000.00 or be imprisoned not more than five years, or both, in the discretion of the Court."

The question to be considered here is, what did Congress intend by these words?

In 25 R. C. L., Sec. 217, it is said:

> "The intention and meaning of the Legislature must primarily be determined from the language of the statute itself, and not from conjectures aliunde. When the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning."

In U. S. v. Wiltberger, 5 Wheat. 76, Chief Justice Marshall, in delivering the opinion of the Court said:

> "The intention of the Legislature is to be collected from the words they employ. * * * The case must be a strong one, indeed, which would justify a Court

in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest."

This language was quoted with approval in U. S. v. Bitty, 208 U. S. 393.

In U. S. v. Fisher, 109 U. S. 143, it was said:

"'A legislative act is to be interpreted according to the intention of the Legislature apparent upon its face."

In U. S. v. Reese, 92 U. S. 214, the Court said:

"This is a penal statute and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used."

This language was quoted with approval in Butts v. Merchants and Miners Transportation Company, 230 U. S. 126.

In 25 R. C. L., Section 301, it is said:

"It has long been the well-settled general rule that penal statutes are subject to the rule of strict construction. They will not be construed to include anything beyond their letter, even though within their spirit, and nothing can be added to them by inference or intendment. More correctly, it may be said that such laws are to be expounded strictly against an offender and liberally in his favor. This can be accomplished only by giving to them a literal construction, so far as they operate penally."

Judged by these rules of construction, we respectfully submit that the language of the penal section of the Harrison Law which says that "any person who violates or fails to comply with any of the requirements" means any or all, one or more, of the requirements of the act. **It clearly means that if, by one act, such as an unlawful sale, a person violates one or more of the requirements of the act, he shall be subjected only to one punishment.**

If Congress had intended otherwise, it should have said: "For each violation of this act, **or any of its provisions,** a person, upon conviction, shall be punished," etc. This Congress did not say, and this it certainly did not mean. If, through making a sale of narcotics, a person violates section 1 of the act because the morphine is not sold from an original stamped package, and if he, by the same act, also violates section 2 because the sale is not made in pursuance of a written order, he commits only one crime and subjects himself only to one offense. As stated by the Circuit Court of Appeals for the Fifth Circuit in Ballerinai v. Aderholt, 44 Fed. (2d) 352, "At last it was the sale, and not the failure to register, pay the tax or secure the written order, that constituted the offense."

The Court of Appeals for the Seventh Circuit, in affirming the judgment in this case (50 F. [2nd] 792), says: "The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined

~~fonded~~ by statute." This statement, although correctly announcing a principle of law in the abstract, is inapplicable to this case because it ignores the language of the penal section of the Harrison Law which provides a single punishment for violation of ANY of the requirements of the act.

The opinion of the Court of Appeals calls attention to the fact that distinct violations of law growing out of the same act constitute distinct offenses and may be separately punished under various existing penal statutes. The Court states that one act may constitute a violation of several provisions of the National Prohibition Law and require the imposition of separate punishments. The case of Albrecht v. U. S., 273 U. S. 1, is cited in support of this proposition. The analogy is not in point, however, because the National Prohibition Law provides separate punishments for violation of different sections of the law. It is plainly apparent from reading the Prohibition Law that Congress intended that more than one punishment should be imposed if one act should constitute a violation of more than one section. A specific punishment is provided for manufacturing liquor, one for selling liquor, and the penal section of that law then provides that if any person "violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500."

The Harrison Narcotic Law was enacted as a revenue measure. It was only under this guise that it could pos-

sibly be justified as a proper exercise of the legislative function of Congress under the Constitution. It was as a revenue measure that its validity was upheld by a sharply divided court in U. S. v. Doremus, 249 U. S. 86. The penal provisions of this law are merely incidental to it, and were inserted for the purpose of making the act more effective. Inasmuch as it was not enacted as a criminal law, no construction should be placed upon it which would go beyond the limits of the plain meaning of the words contained in the penal section.

For these reasons we respectfully submit that the Court erred in punishing petitioner separately under counts two and five of the indictment.

2.

We respectfully submit that the testimony of Ella Rush discloses only one crime, and that petitioner should have been subjected to only one punishment. Respecting this, we here quote from the dissenting opinion of Circuit Judge Alschuler, in which he says:

> "But here, accepting at par the evidence for the Government, it seems to me but a single crime appears. Witness Ella Rush, herself an addict, was the keystone of the Government's case. She had been regularly employed by a federal narcotic agent as a decoy to ferret out persons who were unlawfully selling narcotics. She reported for duty at Springfield and sought out a woman named Walker (a codefendant), representing that she wished to buy morphine.

On the night of May 27, 1929, Walker brought appellant to Rush, who, after various pretenses concerning herself, gave appellant $2, requesting him to get her some morphine. He went out and, returning a little later, brought her the morphine. At the same time she gave him $8 more, requesting him to bring her more of the drug. In a few hours he again returned with about ten grains more, and a little later the same day she gave him $10 for more morphine, which he brought her the day following. She asked him for more, but he evidently had become suspicious and did not bring it, whereupon he was arrested. She also paid Walker $10 for introducing her to appellant, all the funds being supplied by the narcotic agent.

"The situation here is decidedly different from that in the Daugherty case, where the sales were to different persons, and separated by intervals of several days. Here the transactions were between the same parties, and in pursuance of the same definite purpose and plan of the narcotic agent to have this person detected and taken in the act of violating the law. The transactions between appellant and Rush, which are alone the foundation of the charge, show a sort of 'continuous performance,' Rush supplying him with the Government's money, and employing each delivery of the drug as an immediate leverage for inducing him to procure more of the same. There was substantially no interval of time between the receiving of one and the advancing of the money for the next installment.

"I do not question the propriety, in proper cases such as this, of resorting to such means for detecting and punishing crime, but if, in the detecting process,

the Government sees fit to make an installment affair of it, I do not think the Government is in position to say that each installment of such a general operation constitutes a separate crime. The agent conducted the affair with an unbroken continuity, with the motive and plan of adducing proof that this man could and would and did unlawfully procure and sell and deliver narcotic drugs. It was essentially more a buying than a selling transaction. The Government procured it to be done. The sectional nature of the transaction was a device of the agent, not of appellant, who would no doubt have been quite willing to sell the entire quantity at once instead of on the federal agent's 'installment plan.' ''

We believe that this language, taken from the dissenting opinion, should be adopted as the law of this case. Inasmuch as the deliveries of drugs were all to the same person, a Government informer, and were incited and induced by the informer, petitioner should be held answerable only for one crime.

3.

The prosecution went to great lengths to prejudice the jury against petitioner. He was asked in cross-examination if he was personally acquainted with Henry Walker and with John Smith, known as "Cookie Smith"; if he knew William Bapple, Edward Lewis, sometimes known as "Clarke"; Lloyd Hemstrett and "Speck" Mahoney. He was then asked this question:

"Now, I will ask you if these men, Henry Walker, John Smith, alias 'Cookie' Smith; Edward Lewis, alias 'Clarke'; John Mahoney, known as 'Speck' Mahoney, and Lloyd Hemstrett, are not all known to you to be narcotic addicts" (Rec., pp. 22-23).

Appellant's objection to the foregoing questions were overruled and he was required to answer. These questions were grossly improper. They were asked for the purpose of creating prejudice in the minds of the jurors through the insinuation that petitioner associated with drug addicts. Proof that he associated with addicts would not have corroborated the charge that he sold morphine to Ella Rush.

Petitioner denied selling any narcotics to the Rush woman. The question of whether he did sell to her should have been submitted to the jury without the injection of these prejudicial questions.

Petitioner's brother, George Blockburger, was asked, in cross-examination (Rec., p. 27):

"Are you on the bond of a man named Bapple, who is charged with the violation of the Narcotic Law in this Court?"

An objection to this question was overruled. It had not been shown that Bapple was under indictment in that court. The question was not based upon any evidence and was asked for the sole purpose of prejudicing petitioner's defense.

In the closing argument to the jury the District Attorney said:

> "I am an officer of the Government, and the Court is an officer of the Government, and we know Ella Rush" (Rec., p. 28).

Petitioner promptly objected to this improper statement, whereupon the Court said:

> "The jury is instructed to disregard the statement except that the Court has seen her here, and has seen the circumstances under which she comes here."

This language of the Court, although purporting to sustain the objection, undertook to justify the improper argument of the District Attorney.

Later the District Attorney, in his closing argument, said:

> "Here is a pickpocket, and he wasn't shocked at that. That is the kind of people they associate with."

Petitioner again objected (Rec., p. 29), whereupon the Court said to the jury:

> "The jury will understand this is Mr. Alexander's conclusion from the evidence."

The improper statement was permitted to stand. There had been no testimony that there was a pickpocket any-

where. The only testimony had been that Ella Rush falsely introduced narcotic agent Peterson as a pickpocket when he was, in fact, a Government agent, and that Peterson had falsely represented himself to be a pickpocket. There was no testimony in the record to show that petitioner associated with pickpockets or that he, himself, was one. We submit that the prejudicial conduct of the District Attorney throughout cross-examination and argument, entitles petitioner to reversal of this judgment and a new trial.

Conclusion.

We respectfully submit that the record of this case discloses only one crime. The judgment is erroneous and excessive because it imposes triple punishment. This judgment should either be corrected in this court or reversed with directions to the District Court to correct it so that it will provide that the punishment of petitioner shall not exceed five years imprisonment and a fine of $2,000.00.

If it should be that this Honorable Court does not agree with our contention that only one crime has been proved, we submit that the law does not permit dual punishment for one sale of narcotics, and that, for this reason, the imposition of the maximum punishment under both counts two and five, each involving the same sale, was erroneous, and that this Honorable Court should either correct the

judgment here by providing that the dual punishment under counts two and five shall not exceed five years imprisonment and a fine of $2,000.00, or remand the case to the District Court with direction to that Court to correct the judgment accordingly.

Respectfully submitted,

HAROLD J. BANDY,
Granite City, Illinois,
Attorney for Petitioner.